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United States Senate

COMMITTEE ON
ENERGY AND NATURAL RESOURCES

WASHINGTON, DC 20510-6150

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September 15, 2014

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW
Washington, D.C. 20460

The Honorable John McHugh
Secretary
Department of the Army
The Pentagon
Washington, D.C. 20301

Dear Administrator McCarthy and Secretary McHugh:

I am writing to express my deep concerns with the proposed regulation to amend the definition of Waters of the United States (WOTUS) by your agencies. I remain unconvinced by the claims the agencies continue to make that the proposed rule is merely a clarification of the extent of federal jurisdiction under the Clean Water Act. The addition of tributaries, adjacent waters and "other waters" as definitional categories of waters to define federal jurisdiction would appear to be a *prima facie* expansion of federal authority. While I am unequivocally in favor of ensuring the sustained health of our nation's water resources, I believe the proposed regulation will have unjustifiably negative impacts on many sectors of our economy. In particular, I want to call to your attention the potential impacts on residential and commercial real estate development, a vital sector of our economy, and one that involves many small businesses and employs thousands of people.

The negative impact on real estate development is a glaring example of the disruptive practical effects of the proposed rule. Increased permitting requirements will cause delay for site modifications, and landlords, who often have specific time incentives built into lease agreements, may be unable to fulfill time obligations or predict certainty in those lease agreements. This would jeopardize their ability to retain and attract future tenants. In addition, tenant companies seeking to expand or relocate their operations will be impacted by project scheduling uncertainty and increased time and cost. This would change the cost calculations and potentially put at risk the capital investment necessary to support such projects. Perhaps most troubling is that these property owners could now have to meet water quality standards for ditches, ephemeral streams, or other features on their property that were not previously considered WOTUS.

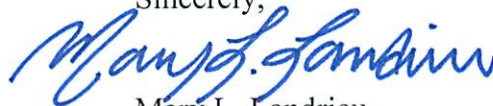
Under the proposed rule, more waters would become WOTUS, and as a result, fewer projects will qualify for nationwide permits. Instead, applicants will need to obtain an individual permit from the Corps. The increased utilization of individual permits will trigger more companion federal permitting processes; during these costly review procedures, consulting federal agencies are not bound by a specific time limit. Over \$1.7 billion is spent each year by the private and public sectors on administrative costs to obtain wetlands permits, without taking into account the cost of required mitigation.

Additionally, with more WOTUS dotting the landscape, more section 404 permits will be needed. Section 404 permits are federal "actions" that trigger additional companion statutory reviews by agencies, other than the state permitting agency, including reviews under the Endangered Species Act, the National Historic Preservation Act, and the National Environmental Policy Act. Longer permit preparation and review times, when combined with the higher costs associated with additional reviews, place small businesses in a no win situation, as they lead to higher costs overall and greater risks that can ultimately jeopardize a project. The potential effect of the proposed rule directly conflicts with the Administration's stated commitment to expedite infrastructure projects.

Finally, I am deeply concerned that this rule undermines the historically successful federal-state cooperation in the administration of the Clean Water Act. The waters this proposed rule seeks to cover through federal jurisdiction are not unprotected. They are currently protected as state waters. Surely, a better approach to ensuring these isolated and intrastate waters are adequately protected would be for EPA and the Corps to work with states to improve their water quality programs. Assertion of federal jurisdiction over these waters should be a last resort and not the first course of action.

I respectfully request your careful consideration of these concerns and, further, that you give thought to withdrawal of the proposed rule and re-propose a more thoughtful and carefully tailored approach to protection of these water resources.

Sincerely,



Mary L. Landrieu
Chair